United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7121

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7121

B

P/S

MIRIAM WINTERS,

Plaintiff-Appellant,

-against-

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; Doctors H. Blankfeld, Dusan Kosovic, Sandra Grant, Gerald Grant, Gerald Ollins, Christine Jordan, Thomas DaCorta and Catherine Dromgoole and other doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Defendants-Appellees.

APPELLANT'S BRIEF

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DECISION BELOW

The decision below was rendered by Judge Orrin G. Judd, EDNY.

STATEMENT OF THE ISSUES

1. Was it an abuse of discretion for the district court, on appellant's motion to re-open FRCP Rule 60(b), prior to trial, to refuse to re-instate the action as to appellees, when the action was re-instated as to other defendants and when, on the same evidentiary record, the Court of Appeals previously held that plaintiff did state a cause of action for violation of her First Amendment rights and remanded the case for a trial on the merits?

2. Was a dismissal of the action as to appellees in error? Does the doctrine of official immunity protect appellees? Can they be held liable to appellant for damages after trial on the merits?

STATEMENT OF THE CASE

This is an appeal from an order of the Honorable Orrin G. Judd, United States District Judge for the Eastern District of New York, dated December 13, 1974, insofar as plaintiff-appellant's motion to re-open was denied as to defendants-appellees Miller, Thomas and Ollins and the action dismissed as against said defendants (8a)*. Appellee Miller was Commissioner of the Department of Mental Hygiene, appellee Thomas is Psychiatric Director at Bellevue Hospital, and appellee Ollins was a staff doctor at Bellevue Hospital.

FACTS

Appellant MIRIAM WINTERS is a follower and practitioner of Christian Science. In May, 1968, she was involuntarily admitted to Bellevue Hospital, transferred from there to Central Islip State Hospital and confined for several months. Throughout her stay at Bellevue and Central Islip, Miss Winters was regularly given medication, including heavy doses of tranquilizers administered orally and intramuscularly, against her will and over her clearly stated religious objections. Miss Winters thereafter brought this action for damages in the United States District Court, Eastern District of New York, under 42 USC §1983, against the Directors of Bellevue and Central Islip, the Commissioner of Mental Hygiene and the staff doctors involved.

*References are to pages of the Appendix.

PRIOR PROCEEDINGS

Appellant has been before this Court on two prior occasions. Now, as the result of the decision of the Honorable Orrin G. Judd dismissing the action as against defendants-appellees Miller, Thomas and Ollins, appellant regrets that she must again seek relief in this Court.

On May 26, 1971, this Court reversed a decision of the district court which had granted defendants' motion for summary judgment dismissing the complaint (306 F.Supp. 1158; Travia, J.). This Court found that plaintiff stated a cause of action for violation of her First Amendment right to religious liberty and remanded the case "with direction that the district court proceed to trial on the merits." 446 F.2d 65 (2d Cir. 1971). The Supreme Court denied defendants' petition for a writ of certiorari. 404 US 984 (1971).

In January 1974, Judge Travia ordered plaintiff-appellant to submit to a physical and mental examination pursuant to Rule 35 of the Federal Rules of Civil Procedures, and all proceedings were stayed. Plaintiff returned to this Court which on April 1, 1974, issued a writ of mandamus prohibiting the Rule 35 examination. The case was again remanded to the district court. Winters v. Travia, 495 F.2d 839 (1974).

On June 5, 1974, the parties came before Judge Orrin G. Judd, to whom the proceedings had been transferred, for a pre-trial conference. Depositions of the parties were subsequently scheduled and taken, and the matter was set for trial to be held on November 4, 1974. Unfortunately, transcription of the depositions was delayed by the reporting service and the depositions were unavailable for trial (6a, 7a).

Neither plaintiff-appellant's attorney nor the representative of the Attorney General's office appeared on the morning of November 4. It was their understanding that the trial was being re-scheduled for a later date and that the appearance of counsel was not required. (7a). Judge Judd dismissed the action (1a). The dismissal was left standing, following oral argument later that afternoon, but Judge Judd agreed to entertain a motion to re-open. (7a).

On December 4, 1974, appellant made a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to re-open the action (2a). Counsel for plaintiff-appellant submitted an affidavit in support of the motion in which he explained that his non-appearance on November 4 was the result of his prior conversations with the Judge's law clerk and his good-faith belief, based upon those conversations, that appearance of counsel was not necessary (5a-7a). No papers were submitted in opposition to the motion.

The motion to re-open was heard on December 13. Judge Judd apparently accepted counsel's explanation of his non-appearance on November 4 by ordering that the cause of action be reinstated against some of the defendants. He did not reinstate the action as against defendants-appellees Miller, Thomas and Ollins, however, and, in effect, dismissed the action as against them.

Judge Judd's brief order, without elaboration, was endorsed on the back of plaintiff-appellant's motion papers (8a) and entered on December 17, 1974. Appellees made no motion to dismiss and submitted no papers in opposition to plaintiff-appellant's motion to re-open. The depositions had not been transcribed and the evidentiary record before the district court was identical to the record before this Court when it first remanded this case for trial on the merits. 446 F.2d 65 (1971). Cert. denied 404 US 984 (1971).

The appeal is from that order of the district court.

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT ON APPELLANT'S MOTION TO RE-OPEN PURSUANT TO RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE WAS AN ABUSE OF DISCRETION.

The Order appealed from is the decision of the district court on plaintiff-appellant's motion to re-open pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. (8a). Appellant's motion was necessitated by the district court's dismissal of the action following the failure of appellant's counsel to appear for trial on November 4, 1974. (1a).

It is apparent from the affidavit of counsel in support of appellant's motion to re-open below that he innocently and reasonably concluded from conversations with the district judge's law clerk that the case would be re-scheduled for another date and that the appearance of counsel on November 4 was not required. (6a, 7a). It is likewise apparent that counsel's failure to appear did not delay the proceedings, since the deposition transcripts - of plaintiff and several defendants - were not made available by the reporting service until much later and the trial would, in any event, have had to be adjourned. (7a).

FRCP Rule 60(b) permits an action to be re-opened if the dismissal was occasioned by "mistake, inadvertance, surprise or excusable neglect." Relief under Rule 60(b) is discretionary and the question before the court below on that motion was whether counsel's failure to appear was excusable or not.

Notwithstanding the good faith showing made by appellant's attorney, appellant concedes that it may arguably have been a matter of the district court's discretion to either accept the explanation proferred by counsel and re-open the entire case, or to reject his explanation and refuse to re-open. As it happens, the district court did neither

this court is not asked to review that type of discretionary determination.

Instead the district court chose on its own initiative to differentiate among the defendants, and, in a brief handwritten order, reinstated the action as to some defendants but not as to others (8a). The court did so, moreover, without elaborating on its rationale, in the absence of any new evidence and without benefit of a motion or opposing papers from the defendants-appellees. This was an abuse of discretion clearly within this Court's power to review. 7 Moore's Federal Practice, §60.19.

There is no rational basis for distinguishing among the defendants and certainly none that is even remotely related to the issue of whether counsel's failure to appear for trial was excusable or not. Dr. Ollins, for example, is only one of several doctors involved in the commitment and treatment of Miss Winters who are defendants in this action.

Secondly, the order reinstating the action as to some defendants is an implicit recognition by the district court that whatever gave rise to the original dismissal on November 4 (1a) was, in fact, excused, and that re-instatement was appropriate under FRCP Rule 60(b). This leads to the inescapable conclusion that the lower court's refusal to reinstate as against appellees Miller, Thomas and Ollins was not an exercise of discretion under Rule 60(b), but in fact may constitute a dismissal on the merits.

We can ignore for the moment whether a dismissal on the merits, on the court's own motion, five years after the action was begun, and in the context of an unopposed procedural motion would, by itself, be an abuse of discretion. Such a dismissal is in any event prohibited by the prior order of this Court which considered the question and remanded

to the district court "with instructions that it proceed to trial on the merits." Winters v. Miller, 446 F.2d 65, 71 (2d Cir. 1971), cert. denied, 404 US 984 (1971).

Appellant Winters has been deprived of the opportunity to prove her cause of action against appellees Miller, Thomas* and Ollins. More importantly, the district court had no evidence in the record when it dismissed as against Doctors Miller, Thomas and Ollins that was not already in the record when this Court reversed and remanded to the district court for trial. Depositions of the appellant and several of the defendants (including Miller and Thomas) were taken subsequent to the remand, but the depositions were not transcribed nor in the record before the district court when appellant's Rule 60(b) motion was heard and that court's decision rendered. The district court's order therefore stands in direct conflict with the prior order of this Court.

*It has become known that Dr. Thomas was not the Director of Bellevue Hospital during the time that Miriam Winters was a patient there. By stipulation of the parties, he has been dropped as a defendant for purposes of money damages but remains a defendant for purposes of injunctive or any other relief.

II. THE DISMISSAL OF THIS ACTION AS AGAINST APPELLEES WAS IN ERROR BECAUSE THEY CAN BE HELD LIABLE TO APPELLANT FOR DAMAGES AFTER TRIAL ON THE MERITS.

Whether or not a dismissal as to appellees on the merits prior to trial was within the ambit of the district court's authority (see Point I, supra), that dismissal was in error (8a). The question whether, after a trial on the merits, the appellees could be found liable to appellant Winters for violation of her constitutional rights has, in effect, already been answered in the affirmative by this Court when it held that Miss Winters had a constitutional right to refuse medication for religious reasons and remanded her case for trial on the merits. Winters v. Miller, 446 F.2d 65 (2d Cir. 1971) cert. denied, 404 US 985 (1971). The potential liability of appellees is the law of the case.

It is settled law that appellees, who occupied the positions of State Commissioner of Mental Hygiene, Psychiatric Director at Bellevue Hospital and staff doctor at Bellevue, cannot claim the defense of official immunity in a suit for violation of constitutional rights under 42 USC §1983. Judge Travia so held in his original district court opinion in this case (306 F.Supp. 1158, 1163 (EDNY (1969)) and that determination has survived review by this Court and by the Supreme Court. Winters v. Miller, 446 F.2d 65 (2d Cir. 1971) cert. denied, 404 US 985 (1971) and 495 F.2d 839 (2d Cir. 1974). The law of this case is consistent with the law governing immunity of public officials. E.g., Wood v. Strickland, __US__, 43 USLW 4293 (February 25, 1975); Dale v. Hahn, 440 F.2d 633, 637-8 (2d Cir. 1971); Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966).

Appellee Miller, until recently Commissioner of Mental Hygiene, was also a defendant in Dale v. Hahn, 486 F.2d 76 (2d Cir. 1973),

cert. denied sub nom. Miller v. Dale, 43 USLW 3208 (Oct. 15, 1974). In Dale, the Court of Appeals affirmed a decision voiding the proceedings which declared Mrs. Dale incompetent and appointed a committee over her assets, on the grounds that she was given inadequate notice of the proceedings. Following a trial on the merits, it was apparent that Dr. Miller did not personally commit or order the unconstitutional act, that he did not know about Mrs. Dale or her case until the lawsuit was brought, and that he did not even become Commissioner of Mental Hygiene until several years after the proceedings in which Mrs. Dale was initially declared incompetent and her first committee was appointed. Nevertheless, as Commissioner, Dr. Miller was responsible for the lawful administration of all state hospitals for the mentally ill and was authorized and required to promulgate regulations implementing the Mental Hygiene Law. E.g., Mental Hygiene Law §§7, 11 and 12. In Dale, Dr. Miller was charged with knowing, under procedures then in effect, that patients whom he had a statutory duty to protect, could be adjudged incompetent without adequate notice or hearing. Dr. Miller was held personally liable for the funds expended by Mrs. Dale's committees.

Following its decision affirming Dr. Miller's liability in Dale, this Court granted rehearing to defendants. Upon rehearing, it squarely faced the issue of liability of Dr. Miller and the Director of Harlem Valley State Hospital, and it unanimously re-affirmed its decision (Dale v. Hahn, 2d Cir. Docket No's. 73-1795, 73-1934 (Nov. 21, 1973 and Jan. 9, 1974)). See also: Wright v. McMann, 460 F.2d 126 (2d Cir. 1972).

In the present case, there has not yet been a trial on the merits, but Dr. Miller was the Commissioner of Mental Hygiene during the period that Miss Winters was confined to Bellevue and Central Islip Hospitals.

if he was held responsible in Dale v. Hahn, Dr. Milner was a [illegible] involuntary finger-

responsible for the lawful administration of the hospitals in this case. He had a duty to take reasonably prudent steps to protect Miss Winters and other patients from being forcibly drugged over their clearly stated religious objections and it should not have been possible for Miss Winters' First Amendment rights to be violated in this manner. Although appellee Thomas, as Psychiatric Director at Bellevue Hospital, did not become director until after Miss Winter's release and has been dropped for purposes of money damages, (see footnote, supra p. 8), he has a similar duty to insure that the First Amendment rights of his patients are protected.

The most recent pronouncement of the Supreme Court on the subject likewise indicates that liability of public officials under the Civil Rights laws should be broadly viewed. Under the rule enunciated in Wood v. Strickland, __US__, 43 USLW 4293 (Feb. 25, 1975), where local school officials were alleged to have deprived high school students, expelled for possessing alcoholic beverages at a school activity, of due process, the court would go so far as to:

> impose personal liability
> on a school official who acted
> sincerely and in the utmost
> good faith, but who was found -
> after the fact - to have acted in
> "ignorance...of settled, indisputable
> law."
> 43 USLW at 4300 (Powell, J., dissenting)

This is a broader base for liability than is required here.

Finally, appellee Ollins was one of the doctors at Bellevue, among others, whose name appears in Miss Winter's medical records and who came in contact with her during the period that she was being forcibly medicated (see affidavit of Bruce J. Ennis, at No. 12 of the Record on Appeal). Dr. Ollins is one of several staff doctors at Bellevue and Central Islip hospitals who are defendants in the case, yet he was the only one dismissed by the court below (8a). Certainly,

as to those doctors who had some personal and direct involvement in the medical treatment administered to appellant Winters, there can be no question of their liability. There is only the question of damages, to be determined at trial.

For these reasons, if the district court's order dismissing the action against appellees was a dismissal on the merits, that dismissal was in error.

CONCLUSION

This court should reverse the order of the district court which is appealed from (8a) insofar as it thereby dismisses the action as against appellees Miller, Thomas and Ollins.

DATED: New York, New York
March 19, 1975

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

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Docket No. 75-7121

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

ELIZABETH MELENDEZ, being duly sworn, deposes and says:

Deponent is not a party to the above action, is over 18 years of age and resides at 3 Haven Plaza, New York, New York.

That on the 20th day of March, 1975, deponent served two copies of the within one copy of the within APPELLANT'S BRIEF and APPENDIX upon W. Bernard Richland, Corporation Counsel of the City of New York, Municipal Building, New York, New York and Louis J. Lefkowitz, Attorney General of the State of New York, 2 World Trade Center, New York, New York the addresses designated by said attorney(s) for that purpose by depositing a true copy of same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Elizabeth Melendez

Sworn to before me this

20th day of March, 1975.

Angelina Mitchell
NOTARY PUBLIC

ANGELINA MITCHELL
Notary Public, State of New York
No. 31-2731265
Qualified in New York County
Commission Expires March 30, 1975